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Supreme Court, U.S.
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In The

Supreme Court of the United States

MARIA DRACOS, as Administratrix for the Estate of Nicholas Dracos, deceased,

Petitioner,

vs.

HELLENIC LINES LIMITED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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76 pp

QUESTIONS PRESENTED FOR REVIEW

Whether the presumptive application of offensive collateral estoppel may be disregarded at the discretion of the court without requiring proof of change of circumstances.

Whether the Jones Act and American law are applicable to a Greek seaman employed by Hellenic Lines Ltd., which company had been adjudged by this Court in *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970) to be a Jones Act Employer and the evidence establishes that the vessel on which the seaman was serving is one of a fleet of some 24 or more vessels operated out of New York as a base of operations and the injury occurred in an American port.

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No.

In The

Supreme Court of the United States

October Term, 1985

MARIA DRACOS, as Administratrix of the Estate of Nicholas Dracos, deceased,

Petitioner,

vs.

HELLENIC LINES LIMITED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The Petitioner, Maria Dracos, as Administratrix of the Estate of Nicholas Dracos, Deceased, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on April 27, 1983 and affirmed by the court en banc on May 9, 1985. The opinion of the Court of Appeals is reported as 705 F. 2d 1392 (4th Cir. 1983). The opinion of the Court of Appeals for the Fourth Circuit sitting en banc is reported at 762 F. 2d 348 (4th Cir. 1985); both opinions appear

in the appendix hereto. The opinion rendered by the District Court for the Eastern District of Virginia at Norfolk is not reported. The opinion appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 27, 1983. A timely petition for rehearing en banc was filed and rehearing before the court en banc was granted on August 29, 1983. The opinion and judgment by the court en banc was entered on May 9, 1985 and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

46 U.S.C. § 688 (Jones Act) provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the commonlaw right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

Nicholas Dracos was Chief Engineer of the M/V Hellenic Star. a vessel owned and operated by Hellenic Lines, Ltd. when the vessel was berthed at a pier in Norfolk, Virginia on May 14, 1977. He was found dead on that day in a refrigerated box on the vessel which had a jury rig which was not ship's equipment as a latch to open the heavy reefer door. It was found that when the door was shut, anyone unfortunate enough to be within the confines of the reefer compartment was locked inside and could not obtain release. The temperature of the reefer box was at least 15 degrees farenheit and possibly colder. The reefer box had no alarm bell or other signalling device to warn or alert crew members that a person had become trapped therein.

Maria Dracos, like her late husband, is a Greek citizen domiciled in Greece. Hellenic Lines, Ltd. is a corporation organized and existing under the Kingdom of Greece and was the owner and operator of the M/V Hellenic Star. The M/V Hellenic Star flew the Greek flag. Mr. Dracos' contract of employment provided that Greek law be applied to any disputes between him and his employer. Hellenic Lines, Ltd. was the very same defendant as in *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970), in which Pericles G. Callimanopoulos, a resident alien owning virtually all the stock of Hellenic Lines, Ltd., was found by this Court to have such substantial contacts by virtue of its revenues derived from United States traffic and by its base of operations in New York as to warrant the application of the Jones Act, 46 U.S.C. 688 *et seq.*, for seamen employed by Hellenic Lines Ltd. Petitioner, through the pretrial procedures, took the position that Hellenic Lines Ltd. was a Jones Act employer, having been found so in *Hellenic Lines, supra*. Respondent did raise the question of jurisdiction of the court at pretrial proceedings, but at no time were motions filed under Rules 12 or 56 of the Federal Rules of Civil Procedure or at any time was there introduced any evidence as to a change of circumstances or status.

At the trial, Harry Petsis, the Marine Superintendent of Hellenic Lines, Ltd., on cross-examination testified that he was in charge of the hull and machinery of Hellenic Lines' fleet; that he lived in New York City and his office was in New York City (47a).* Mr. Petsis was asked point blank how many ships there were in the total fleet operated by Hellenic Lines. His answer was that on the East Coast of the United States, the number varied from 30 to 24 ships, of which the Hellenic Star was one and confirmed that Hellenic Lines, Ltd. owned a pier in New York City and operated another in New York City and that they had a building at 39 Broadway, New York City, New York from which this fleet was managed.

The court charged the jury on the Jones Act and the Maritime Law of the United States. The jury found that respondent's negligence and the vessel's unseaworthiness had been the proximate cause of Nicholas Dracos' death and set the total damages at Four Hundred Seventy Five Thousand ($475,000) Dollars with a diminution of 30% for contributory negligence on the part of Nicholas Dracos, reducing the verdict to Three Hundred Twenty Two Thousand Five Hundred ($322,500) Dollars.

This verdict was set aside following a motion for judgment n.o.v. and, in the alternative, for a new trial by the trial court on the grounds that the court lacked subject matter jurisdiction. The court did not reach the motion for new trial, but stated parenthetically that the arguments for a new trial were questionable at best (4a). The Court of Appeals in a split panel affirmed on the grounds that the dynamic nature of the shipping industry warranted disregard of this Court's holding in *Hellenic Lines, supra.* Rehearing before the court en banc was granted and held. A majority of the court with three judges dissenting affirmed. Hellenic Lines Ltd., after the argument but before the opinion went into a Chapter 11 Bankruptcy which became converted to

* Petsis testimony is found at Appendix E.

a Chapter 10 Bankruptcy. In the appendix is the lifting of the automatic stay by the bankruptcy court.

REASONS FOR GRANTING THE WRIT

I.

The decision below rendered nugatory the far-reaching and salutary advances in the application of offensive collateral estoppel.

This Court, in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) sanctioned the use of offensive collateral estoppel. This Court had previously in *Blonder Tongue v. University of Illinois Foundation*, 402 U.S. 313, 328 (1971), approved a defensive use of collateral estoppel. Defensive use of collateral estoppel is that circumstance where defendant attempts to estop the relitigation of an issue that the plaintiff had already unsuccessfully litigated in a suit against another defendant. Offensive estoppel precludes the defendant from litigating an issue that the defendant had previously lost in a suit against another and different plaintiff.

In the *Parklane* decision, the District Court was given broad discretion to determine when it should be applied. However, that broad discretion was directed to certain guidelines or criteria. The court, in establishing offensive estoppel, discussed the possibility that the plaintiff might remain on the sideline and adopt the "wait and see attitude" in the hopes that the first action by another plaintiff would result in a favorable judgment. The passage of time between suits demonstrates that the petitioner herein made no such resort. The second argument to be considered by the Court in its broad discretion was that a defendant sued for small and nominal damages may have little incentive to defend vigorously, particularly if future suits are not foreseeable. This is certainly absent in the instant case. Hellenic Lines had every incentive to resist being tagged a "Jones Act Employer." It knew that having

been tagged a "Jones Act Employer," putting it in parity with American shipowners would subject it to the same likelihood of lawsuits under the Jones Act that would be the lot of an American shipowner. The next criteria which this court pointed to as an area of discretion for the trial judge would be if the judgment relied upon was inconsistent with one or more previous judgments. Petitioner advanced for consideration consistent cases.

The trial court did in effect accept the offensive estoppel because it charged the jury on the Jones Act and the General Maritime Law. At the motion for judgment n.o.v., at the urging of the respondent, it became wedded to the idea that petitioner was bound at the trial to introduce factual testimony to prove subject matter jurisdiction.

The consideration given by the court to offensive estoppel is minimal. In a footnote to the opinion, it is condensed to:

> "The plaintiff also contends that because American Courts exercised jurisdiction over this defendant in previous cases, we should do the same."

The argument for offensive estoppel was that *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970), was a determination by this Court that it found the *Lauritzen* criteria incomplete in the face of a substantial American presence that Hellenic was a Jones Act employer. The Court quoted from Judge Medina speaking for the Court of Appeals for the Second Circuit when he said:

> "Moreover, each factor, or contact, or group of facts must be tested in the light of the underlying objective, which is to effectuate the liberal purposes of the Jones Act." *Bartholomew v. Universe Tankships, Inc.*, 263 F. 2d 437, 441 (2nd Cir. 1959)

The majority opinion of the Court of Appeals for the Fourth Circuit justifying the denial of the presumptive effect of this Court's finding in *Hellenic Lines, Ltd. v. Rhoditis, supra*, based upon the passing of years, rejected cases submitted by petitioner revealing the continuing American presence of Hellenic Lines. The consideration of these cases was compacted in the opinion of the majority in the phrase:

> "The first four cases cited are inapposite because they only reflect the status of the defendant as it existed several years prior to the accrual of the instant cause of action. *Vassalos* is inapposite because, in that case, the issue of jurisdiction was never raised."

Vassalos v. Hellenic Lines, Ltd., 482 F. Supp. 906 (E.D. Pa. 1979) is not so easily disregarded. It is a case contemporary in time with the instant case. In that case in another district, the United States District Court for the Eastern District of Pennsylvania, Hellenic Lines, Ltd. agreed that the Jones Act applied to a Greek national serving aboard a Hellenic Lines ship who had been injured and had brought a suit under the Jones Act.

Respondent at all times remained silent as to change in circumstances. In no pleading, in no affidavit duly filed to any motion, did the respondent ever state for the record any fact that would indicate or even give a court an opportunity to infer or conclude that any of the circumstances that provided the foundation for this Court in *Rhoditis* had in any way been altered. All that the majority opinion of the Court of Appeals for the Fourth Circuit could say was that the shipping industry is a dynamic industry, subject to change. If anything, the stipulation in *Vassalos* and the testimony of the Marine Superintendent of a most substantial fleet operating on the East Coast out of New York decries any significant change in circumstances.

The dissent of Judge Murnaghan notes the course that the trial court should have taken:

> "In *Rhoditis*, it was established in a trial in federal district court, was affirmed by a court of appeals, and was impressed with the *imprimatur* of the Supreme Court, that Hellenic Lines Ltd. ("Hellenic"), the same party defendant in a Jones Act case as the defendant in the case *sub judice*, was an "employer" for purposes of the Jones Act. The voluminous evidence marshalled in the *Rhoditis* litigation showed that Hellenic had sufficient American contacts to bring its activities under the purview of the Act (23a).
>
> In my view the *Rhoditis* case should have been accorded presumptive collateral estoppel effect by the district court, and the burden was Hellenic's to establish a change in circumstances since the *Rhoditis* litigation sufficient to relieve that adjudication of preclusive effect. By refusing to place that burden upon Hellenic and, instead, requiring the plaintiff, Dracos, to remake, if indeed not reinvent, the entire wheel, the majority has carried the concept of 'changed circumstances' to an extreme that saps the collateral estoppel doctrine of its vitality. *Cf. Scooper Dooper Inc. v. Kraftco Corp.*, 494 F. 2d 840, 846 (3d Cir. 1974) ('Rare would be the case in which counsel could not conjure up some factual element that had changed between adjudications')" (24a).
>
> . . . . .
>
> "The majority's premise—that the shipping industry presents a constantly changing factual situation—is divined from nothing. No fact drawn

> from the record, no fact ascertainable by way of judicial notice, is summoned to set the shipping industry apart from the host of other industries implicated in litigation daily" (25a).

Judge Murnaghan then went on to sum up the obligation of a party against whom an offensive estoppel has been leveled.

> "The question properly stated, the answer easily follows. Where it is just as likely as not that circumstances have remained the same, where evidence of changed circumstances as a matter of fact is most readily available to the party against whom a prior judgment is asserted as collateral estoppel, and where there can be no question that the prior judgment was the product of a full, fair, and vigorous litigation, that prior judgment should be accorded presumptive collateral estoppel effect. The plaintiff was entitled to assert the *Rhoditis* decision and thus establish a *prima facie* case that Hellenic is a Jones Act 'employer.' The burden, then, properly shifted to Hellenic to come forth with facts pertinent to a real, and not hypothesized, change in circumstances sufficient to relieve the *Rhoditis* decision of preclusive effect. That Hellenic has not done" (27a).

As Judge Murnaghan points out, his opinion as to presumptive effect and the duty of the defendant to come forward to indicate that circumstances have changed is supported by the Restatement Second of Judgments in Section 27[1] (28a).

1. While not strictly a conflict between Circuits, the court in *Papaioannoiu v. Hellenic Lines, Ltd.*, 569 F. Supp. 724, 729 (E.D.Pa. 1983), expressly rejected the holding of the instant case and adopted the dissenting opinion of Judge Murnaghan. He gave the *Rhoditis* decision a presumptive collateral estoppel effect that Hellenic was a Jones Act employer.

The charge that offensive estoppel may contain elements of unfairness loses vitality when it is given a presumptive effect giving the defendant or the party upon whom it is visited an opportunity to show facts or considerations to overcome such presumption. This is a different situation than when the offensive estoppel is claimed to have a preclusive effect which binds the party against whom it is leveled from doing anything or proceeding at all.

In *Selectron Inc. v. American Tel. & Tel. Co.*, 587 F. Supp. 856, 866 (E.D.Tex. 1984), American Telephone and Telegraph Company submitted a 16-volume compendium of documents containing new evidence that it asserted would change the result of a subsequent trial. It is submitted that the trial court should require no less of Hellenic Lines were it able to point to a single substantial variance with the testimony in the *Rhoditis* case.

The need to avoid re-litigation when there is no showing that there is anything to re-litigate and the potential unfairness for parties to come was demonstrated in *Nestle Co., Inc. v. Chester's Market, Inc.*, 596 F. Supp. 1445, 1452-53 (D. Conn. 1984), when it appeared that the Nestle Company had had its trademark for Toll House cookies found to be invalid on the grounds that Toll House had achieved the dignity of a generic status, a settlement was negotiated on the basis that the decision in the trial court would be vacated so as to avoid offensive collateral estoppel. The court below refused on the grounds that the reach of *Blonder Tongue* and *Parklane Hosiery Company* should not thus be evaded. This Court denied certiorari in a case of similar holding, *Chemtron Corp. v. Business Funds, Inc.*, 682 F. 2d 1149 (5th Cir. 1982), *cert. denied*, 460 U.S. 1013, 103 S. Ct. 1254, 75 L. Ed. 2d 483 (1983).

The dissenting opinion in this case has underlined that offensive collateral estoppel need not be necessarily preclusive but that cast in a presumptive mode, it affords justice to all. A party

who can truly claim changed circumstances should and must demonstrate those changed circumstances to the satisfaction of the court to avoid the preclusive effect and absent such a demonstration, then the presumption is fulfilled that the circumstances have not changed.

In *Provident Tradesman's Bank and Trust Co. v. Patterson*, 390 U.S. 102, 88 S. Ct. 733, 19 L. Ed. 936 (1968), this Court granted certiorari because the Court of Appeals for the Third Circuit eviscerated the thrust of Federal Rule of Civil Procedure 19 by a misplaced concept that jurisdiction would be lacking if a so-called indispensible party were not joined. This fulfilled the reach of Supreme Court Rule 17(1)(c), that the court below has rendered a decision in conflict with the applicable decisions of this Court or frustrates a concept which this Court has utilized in support of judicial economy and efficiency. Just as the effect of Rule 19 was seriously compromised, the court below has seriously compromised the concept of offensive collateral estoppel and its advantages and goals.

II.

Decision below ignores substantial American interest and conflicts with the decisions of other Courts of Appeal as to the application of the Jones Act, 46 U.S.C. Section 688 where the seaman is a foreign national.

In 1970, the Supreme Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) put aside past practice and held that a right of action for wrongful death existed under the General Maritime Law.

The United States Supreme Court in *Lauritzen, Id* at 576 refused to apply the literal reach of the language of the Jones Act when it said:

> If read literally, Congress has conferred an American right of action which requires nothing more than that plaintiff be "any seaman who shall suffer personal injury in the course of his employment." It makes no explicit requirement that either the seaman, the employment or the injury have the slightest connection with the United States.

Lauritzen v. Larsen, 345 U.S. at 576-77.

This Court recognized that some degree of predictability is necessary in the choice of law area and sets forth the following seven possible contacts which were to be evaluated in deciding whether the Jones Act should be applicable to a given situation:

1. The place of the wrongful act.

2. The law of the ship's flag.

3. The allegiance or domicile of the injured seaman.

4. The allegiance of the defendant shipowner.

5. The place of contract.

6. The inaccessibility of a foreign forum.

7. The law of the forum.

Of the seven factors enumerated, the court characterized the law of the flag as "perhaps the most venerable and universal rule of maritime law relevant to our problem", which, "must prevail unless some heavy counter-weight appears." 345 U.S. at 586. The court held in *Lauritzen* that no such counterweights existed and,

therefore, the law of the flag controlled, precluding applicability of the Jones Act.

The second Supreme Court decision regarding the rights of foreign seaman was *Romero v. International Terminal Co.*, 358 U.S. 354 (1959). Romero was a Spanish citizen who signed a working agreement in Spain to work aboard a Spanish flag vessel owned by a Spanish corporation. The court held that the situs of the injury, New York, was insufficient under the *Lauritzen* criteria to warrant application of this country's law against the Spanish shipowner.

The *Romero* decision is also important for the Supreme Court's pronouncement that for the purposes of choice of law determination in a suit by foreign seamen, the same choice of law criteria are applicable to both claims under the Jones Act and claims under the general maritime law. The Supreme Court held:

> ". . .But the similarity in purpose and function of the Jones Act, and the general maritime principles of compensation for personal injury, admit of no rational differentation of treatment for choice of law purposes."

Romero v. International Terminal Co., 358 U.S. at 382.

Thus, if the court determines that the Jones Act is applicable to a foreign claim, the general maritime remedies for maintenance and cure and unseaworthiness will also apply. This would also include the general maritime remedy for wrongful death outlined by the Supreme Court in *Moragne v. States Marine Lines Inc.*, 398 U.S. 375 (1970) which would be available to the survivors of deceased foreign seamen.

The third Superior Court decision was *Hellenic Lines Ltd. v. Rhoditis,* 398 U.S. 306 (1970). There were many similarities to the instant case. Petitioner was a seaman signed on in Greece and was a Greek citizen. His contract of employment provided that Greek law and a Greek collective bargaining agreement apply between the employer and the seaman and that all claims arising out of the employment contract were to be adjudicated by a Greek court. The Supreme Court also recognized that the respondent could obtain relief through Greek courts if he desired.

The Supreme Court recognized that Hellenic Lines Ltd. was a Greek corporation and that its majority stockholder was a Greek citizen. The court also took notice that Hellenic Lines Ltd. had its offices in New York and another office in New Orleans and more than ninety-five percent of its stock was owned by Pericles G. Callimanopoulos whom the court truncated to Pericles. The court recognized that he was a resident alien and lived in Connecticut and managed the corporation out of New York. The vessel Hellenic Hero was engaged in regularly scheduled runs between other parts of the world and ports in the United States. Hellenic Lines Ltd. earned income from cargo originating or terminating in the United States.

The Supreme Court also recognized that the Jones Act speaks only of the defendant/employer without any qualifications. The court looked to the *Lauritzen* criteria and found of the seven factors there were four that favored the shipowner in declining jurisdiction, namely, that the ship's flag was Greek, the injured seaman was Greek, the employment contract was Greek, and there was a foreign forum available to the injured seaman.

The United States Supreme Court, however, refused to apply the *Lauritzen* test in a mechanical manner. The court adopted with approval the words of Judge Medina speaking for the Court of Appeals for the Second Circuit:

> The decisional process of arriving at a conclusion on the subject of the application of the Jones Act involves the ascertainment of the facts or groups of facts which constitute contracts between the transaction involved in the case and the United States, *and then deciding whether or not they are substantial*. Thus each factor is to be "weighed" and "evaluated" only to the end that, after each factor has been given consideration, a rational and satisfactory conclusion may be arrived at on the question of *whether all the factors present add up to the necessary substantiality*. Moreover, each factor, or contact, or group of facts must be tested in the light of the underlying objective which is to effectuate the liberal purposes of the Jones Act. (Emphasis added.)
>
> *Bartholomew v. Universe Tankships, Inc.*, 263 F. 2d 437, 441 (2d Cir. 1959).

The United States Supreme Court noted that Pericles was a permanent resident alien. As such he is accorded all the constitutional rights of a citizen other than the privilege of holding office or voting. The court noted as significant that the injury had occurred in the United States, that the forum was the United States court, and that Pericles had a base of operations in New York. *Rhoditis*, 398 U.S. at 310. The court also noted that the vessel upon which the alien seaman was injured was not a casual visitor but rather it and its sister ships were earning income from cargos originating in or terminating in the United States. The court went on to say:

> We see no reason whatsoever to give the Jones Act a strained construction so that this alien owner, engaged in an extensive business operation in this

> country, may have an advantage over citizens engaged in the same business by allowing him to escape the obligations and responsibility of a Jones Act "employer." The flag, the nationality of the seaman, the fact that his employment contract was Greek, and that he might be compensated there are in the totality of the circumstances of this case minor weights in the scales compared with the substantial and continuing contracts that this alien owner has with this country. If, as stated in Bartholomew v. Universe Tankships Inc., 263 F.2d 437, the liberal purposes of the Jones Act are to be effectuated, the facade of the operation must be considered as minor, compared with the real nature of the operation and a cold objective look at the actual operational contacts that this ship and this owner have with the United States. By that test the Court of Appeals was clearly right in holding that petitioner Hellenic Lines was an "employer" under the Jones Act.

Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, 310.

The trial court cast aside the compelling testimony of the maritime superintendent, including the fact of an office building in New York City and two piers. This substantial presence, plus the constant trafficking of the fleet at East Coast ports, was cast aside on the possibility that there might be other vessels in other parts of the world. It refused to consider that in a contemporaneous case in the Eastern District of Pennsylvania, *Vassalos v. Hellenic Lines, Ltd.*, 482 F. Supp. 906 (E.D. Pa. 1979), Hellenic Lines had conceded it was a Jones Act employer.

The trial court's ultimate decision was that the evidence was insufficent to show an American base of operations or substantial

enough American contacts to require the application of the Jones Act or the General Maritime Law. The Court of Appeals said these findings are factual and not clearly erroneous. Fed. R. Civ. P. 52(a).

Rhoditis stood for a practice of reality. *Rhoditis* stood for the principle that substantial American presence dictates substantial fulfillment of the sweeping language of Congress in enacting the Jones Act. *Lauritzen* nad changed that in the interests of curbing the broad sweep of Congressional language.

We respectfully submit that factual details make it difficult to claim true conflict between the circuits. Partially this is caused by the courts below seizing upon literally parts of sentences taken from the *Rhoditis* opinion. It is respectfully submitted that the instant case in the Fourth Circuit conflicts sharply with the Second Circuit, *Antypas v. Cia. Maritima San Basilio, S.A.*, 541 F. 2d 307 (2nd Cir. 1976), *cert. denied,* 429 U.S. 907 (1977); *Bartholomew v. Universe Tankships, Inc.*, 263 F. 2d 437 (2nd Cir. 1959), and the Fifth Circuit, *Fisher v. Agios Nicolaos V.*, 628 F. 2d 308 (5th Cir. 1980), 1981 AMC 1669, *reh. denied,* 636 F. 2d 1107 (1981), *cert. denied,* 454 U.S. 816 (1981) where lesser contacts were deemed substantial.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX A—JUDGMENT, OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA DATED AUGUST 21, 1981

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action File No. 79-491-N

MARIA DRACOS, as Administratrix of the Estate of Nicholas Dracos, deceased,

Plaintiff,

vs.

HELLENIC LINES LIMITED,

Defendant.

JUDGMENT DATED AUGUST 21, 1981

This action came on for ~~trial~~ (hearing) before the Court, Honorable J. CALVITT CLARKE, JR., United States District Judge, presiding, and the issues having been duly ~~tried~~ (heard) and a decision having been duly rendered,

It is Ordered and Adjudged the the defendant's motion for a judgment non obstante veredicto is granted and judgment is entered in favor of the defendant.

Appendix A

Dated at Norfolk, Virginia, this 21st day of August, 1981.

W. FARLEY POWERS, JR.
Clerk of Court

/s/ illegible
Deputy Clerk

Appendix A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA NORFOLK DIVISION

CIVIL ACTION
NO. 79-491-N

MARIA DRACOS, as Administratrix of the Estate of Nicholas Dracos, Deceased,

Plaintiff,

v.

HELLENIC LINES, LIMITED,
a Greek corporation,

Defendant.

OPINION AND ORDER

This matter comes to the Court on the defendant's Motion for Judgment *Non Obstante Veredicto*.[1] The plaintiff, Maria Dracos, the administratrix of the estate of Nicholas Dracos, filed suit against the defendant, Hellenic Lines, Limited ("Hellenic"), on May 3, 1979. The Complaint alleged that Nicholas Dracos died on board the M/V HELLENIC STAR on May 14, 1977, as a result of the defendant's negligence and failure to provide

1. The defendant has also filed a Motion for a New Trial. Because of our disposition of the defendant's Motion for Judgment *Non Obstante Veredicto*, we need not address this second motion.

a seaworthy vessel.[2] Following a three-day trial, the jury found that the defendant's negligence and the vessel's unseaworthiness had been the proximate cause of Nicholas Dracos' death and set the total damages at Four Hundred Seventy-Five Thousand Dollars ($475,000).[3]

The defendant's initial and strongest contention in support of its motion is that the plaintiff failed to prove that this Court had jurisdiction over the instant dispute.[4] The plaintiff filed suit under the Jones Act, 46 U.S.C. § 688 *et seq.*, and under the general maritime law of the United States.[5] The defendant raised the

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2. It is undisputed that the defendant is the owner of the vessel, M/V HELLENIC STAR, on board which Nicholas Dracos died.

3. The jury found that Nicholas Dracos' percentage of contributory negligence to his death was 30%. The jury further found that, without deduction for contributory negligence, the damages for loss of support, financial contributions and reasonable funeral expenses totaled Four Hundred Thousand Dollars ($400,000) and the damages for loss of nurture, companionship, consortium and physical pain and mental anguish totaled Seventy-Five Thousand Dollars ($75,000).

4. The defendant has raised several other grounds in support of its motion. Hellenic contends that the plaintiff was improperly permitted to proceed on the theory of unseaworthiness, that this Court improperly allowed the jury to consider an award for non-pecuniary losses and that the evidence was insufficient to permit the submission of the case to the jury. Although we find the validity of these arguments questionable at best, we need not address them in detail in light of our disposition of the defendant's motion on the basis of the jurisdictional issue.

5. Although the plaintiff did not specifically allege general maritime jurisdiction, she alleged that Nicholas Dracos "died as a result of . . . the

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issue of jurisdiction by stating in its Answer that "[t]he defendant asserts that this court has no jurisdiction over the subject matter of this action as neither the Jones Act or any other American law or statute is applicable to the causes of action asserted herein." The defendant reasserted this position in its Statement of Issues, filed on July 5, 1979, and in the Order on the Final Pretrial Conference, entered by this Court on October 3, 1980. The plaintiff, therefore, has received extensive notice of the jurisdiction Issue.

Because this issue has been raised by the defendant, the plaintiff bears the burden of proving the facts necessary to permit this Court to exercise jurisdiction over the instant dispute.[6] *See, e.g., McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Haynes v. James H. Carr, Inc.*, 427 F.2d 700 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970). In *Lauritzen v. Larsen*, 345 U.S. 571, 583-90 (1953), the Supreme Court listed the seven factors to be considered by a court attempting to determine whether the Jones Act provides a jurisdictional basis for a suit

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unseaworthiness of the said vessel." Because pleadings in the federal courts are to be liberally interpreted, we interpret this allegation as stating a cause of action under general maritime law.

6. The plaintiff contends that under *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), she needs only to assert jurisdiction for this Court to exercise jurisdiction under the Jones Act or general maritime law. Such a contention is not only illogical, but also is contrary to the holding of *Romero*. In *Romero*, the Supreme Court actually upheld the lower court's dismissal of an injured seaman's suit on the grounds that insufficient contacts existed with the United States under the *Lauritzen* test. Thus, *Romero* stands only for the proposition that if a plaintiff asserts jurisdiction, the court may assume jurisdiction for the limited purpose of determining whether it properly may exercise jurisdiction over the subject matter of the dispute.

by an injured seaman against a foreign shipowner.[7] These factors include:

(1) The place of the wrongful act;

(2) The law of the flag;

(3) The allegiance or domicile of the injured seaman;

(4) The allegiance of the defendant shipowner;

(5) The place of the execution of the employment contract;

(6) The inaccessibility of the foreign forum;

(7) The law of the forum.

Jurisdiction is to be assumed by a federal court only if a review of these factors discloses substantial contacts between the

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7. The Jones Act provides in pertinent part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury . . .; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.

46 U.S.C. § 688 (1976).

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"shipping transaction regulated and the national interest served by the assertion of authority." *Id.* at 582. In *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), the Supreme Court extended the applicability of the criteria enumerated in *Lauritzen* to claims brought under general American maritime law.

> The broad principles of choice of law and the applicable criteria of selection set forth in *Lauritzen* were intended to guide courts in the application of maritime law generally . . . [T]he similarity in purpose and function of the Jones Act and the general maritime principles of compensation for personal injury, admit of no rational differentiation of treatment for choice of law purposes. Thus the reasoning of *Lauritzen v. Larsen* governs all claims here.

Id. at 382 (footnote omitted). *See also Lekkas v. LIBERIAN M/V CALEDONIA*, 443 F.2d 10 (4th Cir. 1971). Thus, the seven factors listed in *Lauritzen* govern our power to exercise jurisdiction because the plaintiff has pled only two jurisdictional bases: the Jones Act and general American maritime law.

A review of these seven factors reveals that only two, the place of the wrongful act and the law of the forum, support an application of American law to the instant dispute. The other five clearly support an application of Greek law. The vessel flew the Greek flag, the decedent was Greek, the shipowner is a Greek corporation, the contract of employment was drafted and executed in Greece, and the plaintiff, the decedent's wife, who is also Greek, could have filed suit in Greece had she chosen to do so. In effect, the only nexus with this forum is that the decedent died while

the M/V HELLENIC STAR was moored in Norfolk, Virginia, and that suit was filed in this district. The Court in *Lauritzen* emphasized that in a maritime context, the place of the wrongful act is of minor importance because of the international flavor of maritime enterprises. 345 U.S. at 583-84. Moreover, the Court stated that the fact that suit was filed in an American court essentially should play no part in that court's decision whether to apply American law unless that court had identified a significant American interest in the dispute. *See id.* at 590-91; *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 900 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978). The *Lauritzen* Court found the flag of the vessel and the allegiance of the shipowner to be the two most important factors in determining whether American law should be applied. *See* 345 U.S. at 584-87; *Southern Cross Steamship Co. v. Firipis*, 285 F.2d 651, 653 (4th Cir. 1960), *cert. denied*, 365 U.S. 869 (1961). Both these factors point to the application of Greek law to the instant dispute. Accordingly, under a strict *Lauritzen* analysis, neither the Jones Act nor American general maritime law should govern.

In *Hellenic Lines, Inc. v. Rhoditis*, 398 U.S. 306 (1970), however, the Supreme Court liberalized the *Lauritzen* test by adding an eighth factor to be considered by a court faced with the question of jurisdiction. Justice Douglas, writing for the Court, stated that "the list of seven factors in *Lauritzen* was not intended as exhaustive . . .the shipowner's *base of operations* is another factor of importance in determining whether the Jones Act is applicable; and there may well be others." *Id.* at 309. The Court found that the base of operations of the shipowner was located in the United States and that the owner therefore had substantial contacts with this county. *Id.* at 310. The evidence revealed that the shipowner had its largest office in New York and another office in New Orleans. Moreover, the owner of 95% of the stock

of the company, although a Greek citizen, had been a United States domiciliary for approximately twenty-five years and a lawful permanent resident alien of this country for nearly twenty years. Finally, the vessel aboard which the injury occurred was engaged in trips between various ports of the United States and the Middle and Far East and derived its entire income from cargo that either originated from or terminated in this country. *Id.* at 307-08. *See also Fisher v. AGIOS NICOLAOS V*, 628 F.2d 308, 317 (5th Cir. 1980) (vessel's entire service and entire revenues arose from a base of operations in the United States); *Antypas v. Cia Maritima San Basilio, S. A.* 541 F.2d 307 (2d Cir. 1976), *cert. denied*, 429 U.S. 1098 (1977) (some of stockholders of company were American; shipping line operated out of New York City; earnings of vessel collected in and expenses of vessel paid from New York); *Moncada v. Lemuria Shipping Corp.*, 491 F.2d 470 (2d Cir.), *cert. denied*, 417 U.S. 947 (1974) (corporation that owned vessel was wholly owned by Americans; all officers of corporation were Americans; vessel was managed and chartered from the United States; and 40% of vessel's voyages began or ended in the United States).

The facts regarding the defendant's base of operations proved by the plaintiff in the instant case do not rise to the level of those facts established in *Rhoditis* or in the other three cases cited above. The plaintiff relies essentially on the uncontradicted testimony of Harry Petsis, the marine superintendent of Hellenic, to support her contention that the base of operations of Hellenic is located in the United States.[8]

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8. The plaintiff also contends that because American courts have exercised jurisdiction over this defendant in previous cases, we should do the same. The defendant cites several cases as support for this contention, including *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 (1970); *Masonite Corp. v. Hellenic Lines, Ltd.*, 412 F. Supp. 434 (S.D. N.Y. 1976); *R. L. Pritchard & Co. v. S.S.*

(sic) testified that he has an office in New York City and that Hellenic has a fleet of approximately twenty-four ships operating on the East Coast of the United States, but that this number fluctuates. He further testified that he supervises five port engineers, that he is responsible for the maintenance of the hulls and machinery of Hellenic's East Coast fleet and that all repairs to this fleet have to be funneled through New York City. In addition, the record contains evidence that the HELLENIC STAR had called on at least two American ports before arriving in Norfolk in May of 1977.[9]

We FIND such evidence insufficient proof that the base of operations of Hellenic Lines is located in the United States. The plaintiff presented no evidence of the extent of the defendant's worldwide operations, the nationality or domicile of the owner(s) of the defendant, the location of the defendant's principal business office, or the percentage of the income of the vessel and the defendant derived from contacts with the United States. Without such information, we are unable to determine whether the activities

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HELLENIC LAUREL, 342 F. Supp. 388 (S.D. N.Y. 1972); *Mpiliris v. Hellenic Lines, Ltd.*, 323 F. Supp. 865 (S.D. Tex. 1970), *aff'd per curiam*, 440 F.2d 1163 (5th Cir. 1971); and *Vassalos v. Hellenic Lines, Ltd.*, 482 F. Supp. 906 (E.D. Pa. 1979). The first four cases cited are inapposite because they only reflect the status of the defendant as it existed several years prior to the accrual of the instant cause of action. *Vassalos* is inapposite because, in that case, the issue of jurisdiction was never raised.

9. The plaintiff asserts that Mr. Petsis testified that he was in charge of eight, not five, port engineers and that New York City was the center of operations of the fleet. We have carefully reviewed a transcript of the testimony of Mr. Petsis and find nothing in his testimony to support these assertions.

of Hellenic Lines in this country encompass a small or a large percentage of its total worldwide activities. Accordingly, the plaintiff has failed to meet its burden of proof that the base of operations of the defendant is located in the United States.

Thus even under the more liberal standard established by *Rhoditis,* the plaintiff has failed to demonstrate that the defendant has substantial enough contacts with the United States to justify the application of either the Jones Act or general American maritime law. Only two of the eight factors enumerated in *Lauritzen* and *Rhoditis*, the place of the injury and the law of the forum, point to the application of American law. Moreover, these factors are to be given relatively little weight in comparison to the other six factors, all of which point to the application of Greek law. *See Morewitz v. Andros Compania Maritima, S. A.*, 614 F.2d 379, 383 (4th Cir. 1980). The plaintiff only asserted the Jones Act and general maritime law as the bases for this Court's exercise of jurisdiction over the dispute. Because neither of these bodies of law is applicable to the instant dispute, this Court had no jurisdiction to hear the case. Accordingly, the defendant's Motion for a Judgment *Non Obstante Veredicto* is GRANTED. The Clerk is DIRECTED to enter judgment in favor of the defendant.

/s/ J. Calvitt Clarke, Jr.
United States District Judge

August 21, 1981
Norfolk, Virginia

APPENDIX B—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT (PANEL) AND DISSENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1870

MARIA DRACOS, as Administratrix of the Estate of Nicholas Dracos, Deceased

Plaintiff-Appellant

v.

HELLENIC LINES LIMITED, a Corporation

Defendant-Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge.

Argued March 4, 1982 Decided April 27, 1983

Before WIDENER and MURNAGHAN, Circuit Judges, and POTTER, District Judge.*

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* United States District Court for the Western District of North Carolina, sitting by designation.

Appendix B

Avram G. Adler (Anne E. Fialkowski, Adler, Barish, Levin and Creskoff; C. Arthur Rutter, Jr., John H. Klein, Breit, Rutter & Montagna, on brief) for Appellant; Carter B. S. Furr, W. L. Berkley, III (Jett, Agelasto, Berkley, Furr & Price, on brief) for Appellee.

WIDENER, Circuit Judge:

This appeal presents to us the principal issue of what, if any, collateral estoppel effect facts previously found which underlie the choice of law in a maritime tort action should have in resolving a similar choice of law issue in a later action. Also involved is whether there are sufficient American contacts to require a choice of the law of the United States. The district court refused to give collateral estoppel effect to prior cases and concluded that the law of the United States did not apply. On the basis of this choice of law, the district court further concluded that it lacked subject-matter jurisdiction and granted the defendant's motion for judgment notwithstanding the verdict. We affirm.

I.

Nicholas Dracos was the chief engineer aboard the M/V HELLENIC STAR. He was last seen alive on May 14, 1977, when the ship was berthed in Norfolk, Virginia. Later that day, members of the crew found Dracos dead in the ship's refrigerator hold.

Maria Dracos, the widow of Nicholas Dracos and the administratrix of his estate, filed suit on account of the death of her husband against Hellenic Lines, Ltd., which was his employer and the ship's owner. The complaint asserted causes of action for damages on account of negligence under the Jones

Act, 46 U.S.C. § 688, and for unseaworthiness under the general "American Maritime Law," apparently as a pendent claim. See *Romero*, infra, p. 380.

Throughout the course of this action, the defendant contested the district court's jurisdiction on the ground that the law of the United States did not apply. The defendant raised the issue of the applicability of foreign law in its answer and reiterated its position in its pretrial statement of issues and in various motions. Because it believed that Greek law determined the rights and liabilities of the parties, the defendant also asserted that the plaintiff's causes of action did not arise under the laws of the United States and thus the plaintiff had failed to state a jurisdictional basis for her suit. After the jury returned a plaintiff's verdict, the defendant moved for judgment n.o.v. Upon considering this motion, the district court concluded that neither federal law nor general maritime law of the United States applied in this case. The district court thus found itself to be without jurisdiction and entered judgment for the defendant.[1]

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1. We have not had urged upon us and do not decide any effect *The Bremen* and *Mercury Coal* cases, infra, should have upon our decision, but note that if the rules followed in those cases apply here the result would be the same. We also note that in *Lauritzen*, infra, at 589, the Court recognized that a contractual choice of law should generally control the parties' rights and duties, unless public policy requires otherwise. While *Rhoditis*, infra, did not in terms address the contractual choice of forum question, it could have been raised in that case. Whether there is any inconsistency between *Rhoditis* and *The Bremen*, the court has not decided.

In *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972), decided after *Rhoditis*, infra, the Court upheld a forum selection clause in an international contract in an admiralty case, even though it would result in the application

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II.

Federal courts are courts of limited jurisdiction; their jurisdiction will not be presumed. *Lehigh Mining & Manufacturing Co. v. Kelly*, 160 U.S. 327, 337 (1895). Accordingly, plaintiffs must affirmatively plead the jurisdiction of the federal court. FRCP 8(a)(1); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). Of course, a federal court has jurisdiction to inquire into its own jurisdiction, *Romero v. International Terminal Co.*, 358 U.S. 354, 359 (1959), and the district court did just that in the case at hand.

The plaintiff concedes, as she must, that she had the burden of showing such facts that would lead the court to choose American law. Therefore, the plaintiff's burden of proving jurisdiction was principally a burden to show that the court must choose American law, for on its choice of law its jurisdiction depended.

In *Laritzen v. Larsen,* 345 U.S. 571, 583-90 (1953), the Supreme Court enumerated seven factors to be considered in choosing the proper choice of law to govern a maritime tort: (1) the place of the wrongful act, (2) the law of the flag, (3) the

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of foreign law in a foreign court. It held that forum-selection clauses are prima facie valid and should be enforced unless they are unreasonable under the circumstances. Id. at 10. *The Bremen* involved causes of action in contract and in tort, but the Court placed a heavy burden of proof on the party claiming that the particular controversy was not one in mind when the parties contracted. Id. at 17. *The Bremen* has been followed, in this Circuit and elsewhere, in cases not involving international contracts or suits in Admiralty. See *Mercury Coal & Coke Inc. v. Mannesmann Pipe and Steel Corp.*, slip op. at 5-6, No. 82-1145 (4th Cir. 1982).

allegiance or domicile of the injured seaman, (4) the allegiance of the defendant shipowner, (5) the place of the execution of the employment contract, (6) the inaccessibility of the foreign forum, and (7) the law of the forum. The Court explained that like factors guide choices of law in light of the interests of the governments and national interest involved. Id. at 582. They also determine the applicability of both the Jones Act and general maritime law. *Romero*, supra, at 382. The Supreme Court has also said that these seven factors are not exhaustive and that they should not be applied mechanically. *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 308-09 (1970). The *Rhoditis* Court added other factors to be considered in choosing the proper law. The presence of the foreign shipowner's base of operations within the United States was an important factor in making the Jones Act apply to a foreign seaman's tort claim. 398 U.S. at 309. Additionally, it was held that the substantial and continuing American contacts of Hellenic Lines had to be considered. 398 U.S. at 310.

The district court in the case before us carefully considered these factors. The defendant shipowner and employer was a Greek corporation. Its vessels flew the Greek flag and were registered under Greek law. Both the plaintiff and her husband were Greek citizens and domiciliaries. The contract of employment between Nicholas Dracos and the defendant was drafted and executed in Greece as a collective bargaining agreement of the Panhellenic Seaman's Federation. The contract made Greek law in Greek courts control the rights and liabilities arising from the employment relationship. Maria Dracos had remedies available in a Greek court had she chosen to seek them.

The district court found that only two of the *Lauritzen* factors pointed to the selection of American law. Nicholas Dracos died while the M/V HELLENIC STAR was berthed in Norfolk, and

his widow sued in the United States District Court for the Eastern District of Virginia. As the district court correctly noted, these two factors are relatively unimportant in a maritime context. Because a ship may travel through waters governed by various nations, the test of lex loci delicti would introduce an untoward uncertainty in which standards apply. *Romero*, supra, at 384; *Lauritzen*, supra, at 583. The nature of maritime commerce is such that a vessel will inevitably have contacts with many different nations. If the courts of each nation with substantial contacts applied their own law, the overlapping duties imposed on shipowners would blight maritime shipping. *Lauritzen* at 581. And as is often the case with maritime torts, the place of the wrong in this case was fortuitous. *Romero* at 384.

The filing of suit in federal court is also immaterial unless this country has a significant interest in having its law applied. See *Lauritzen*, supra, at 590-91. An American interest can be most readily made out when the two most important *Lauritzen* factors, the ship's flag and the shipowner's allegiance, point to this country. *Lauritzen*, supra, at 584-87. In *Rhoditis*, however, the Supreme Court decided that an analysis should take into account substantial and continuing American contacts. *Rhoditis* held that when the shipowner, although a foreign corporation, had its base of operations in the United States, and had substantial and continuing contacts with this country, then American law applied in a maritime tort action. *Rhoditis*, supra, at 310.

In concluding that American law did not apply in this action against the same party defendant sued in *Rhoditis*, the district court examined the evidence of the defendant's operations and contacts with the United States. The court found the evidence insufficient to show an American base of operations or substantial enough American contacts to require an application of either the

Jones Act or general American maritime law. These findings are factual and are not clearly erroneous FRCP 52(a). It also concluded that earlier cases in which federal courts determined that American law applied in cases involving Hellenic Lines had no collateral estoppel effect.

III.

In the district court, the plaintiff relied on a number of cases, in which Hellenic Lines had been involved in the federal courts, to support its theory of offensive collateral estoppel. On appeal it does not rely on any of them except *Rhoditis*, which we will discuss later, and *Vassalos v. Hellenic Lines*, 482 F.Supp. 906 (E.D. Pa. 1979). *Vassalos* does not serve as an estoppel because there was no choice of law question decided in that case. Plaintiff's claim that Hellenic stipulated in *Vassalos* to the applicability of the Jones Act is an incorrect construction of that opinion, which states that the stipulation in question was that the action was "prosecuted pursuant" to the Jones Act, not a stipulation of choice of law to confer jurisdiction.

In *Rhoditis*, the Supreme Court held that the defendant was subject to American law based on a finding that the shipowner had its base of operations in the United States and had substantial and continuing American contacts. Those findings, however, concern the defendant's operations only at the time of the *Rhoditis* case. The *Rhoditis* Court did not purport to find that the defendant had its operations permanently based in this country or that its American contacts would continue indefinitely. Twelve years elapsed between the injury to Rhoditis and the death of Dracos.

The plaintiff in this action, who was neither a party nor in privity with a party to the *Rhoditis* litigation, asserts that she does

not bear the burden of proving that the defendant had an American base of operations or substantial continuing American contacts because of the effect of the findings in *Rhoditis*. This is her principal claim on appeal.

The plaintiff's assertion is made possible by the discard of the doctrine of mutuality. That doctrine prevented a party from using a prior judgment to estop an adverse party from contesting an issue unless both parties were bound by the judgment. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328 (1971). *Blonder-Tongue* approved in patent cases a defensive use of collateral estoppel, which in that case was a defendant's attempt to estop the relitigation of an issue that the plaintiff had already unsuccessfully litigated in a suit against another defendant. *Blonder-Tongue*, however, was a prelude to the offensive use of collateral estoppel by which a plaintiff may seek to estop a defendant from relitigating an issue previously litigated and lost to another and different plaintiff.

In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), the Supreme Court sanctioned the use of offensive collateral estoppel. *Parklane* approved a plaintiff's estoppel of a defendant from litigating an issue the defendant had previously lost in a suit against another and different plaintiff. In doing so, however, the Court granted district courts "broad discretion to determine when it should be applied." *Parklane* at 331.

In the instant case, the plaintiff's attempt to preclude the defendant from relitigating the issue of the location of its base of operations or the substantiality of its American contacts is

its claim to the use of offensive collateral estoppel.[2] The district court considered the propriety of allowing the defendant to be so estopped, and concluded that the doctrine should not apply. In refusing to apply the doctrine, the court reasoned at one place that earlier adjudication reflected the status of the defendant only as it existed several years prior to the accrual of the cause of action (twelve years between *Rhoditis* and the instant case, and ten years in the only other case on point). We think that the district court's holding that the doctrine did not apply to the defendant is not an abuse of its broad discretion in view of the lapse of time.

The dynamic nature of the shipping industry, with its constantly changing economic climate and regularly changing fleets, ports, and operations, indicates a changing factual situation that may require the choice of American law under *Lauritzen* and *Rhoditis* one year but may not require the same choice some years later. The district court pointed out in its opinion relevant facts with respect to base of operations and American contacts proved to have existed at the time of *Rhoditis* which the plaintiff did not prove continued to exist at the time of the injury or trial in this case. That is an additional reason for us to find that the district court did not abuse its discretion in declining to apply collateral estoppel to the facts necessary to make a choice of law upon which its jurisdiction depended. The case of *International Shoe Machine Corp. v. United Shoe Machinery Corp.*, 315 F.2d 449 (1st Cir. 1963), is persuasive here. In that case, offensive collateral estoppel was claimed under § 5 of the Clayton Act,

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2. We should say at this point that the issue presented to us was not presented to the district court in quite the same context. We have examined, for example, the briefs filed with respect to the motion for judgment n.o.v. and do not find any reliance on *Parklane*. And that case is not relied upon here although its application is the controlling authority.

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15 U.S.C. § 16, which established a kind of statutory offensive collateral estoppel well prior to the *Parklane* decision. The statute permits a final judgment or decree in favor of the United States to be used as prima facie evidence by any other party as to all matters to which the defendant would be estopped in another action by the government. The court held that offensive collateral estoppel did not apply because the first judgment related only to the period embraced by the evidence adduced at the first trial. 315 F.2d at 457. Unless it is shown that the condition found at a first trial is so permanent as to be unlikely to be disturbed, then we think offensive collateral estoppel may not be used with respect to that condition unless it be shown that the facts upon which the condition was based continued to exist. Such facts were not shown here, as the opinion of the district court pointed out.

We are thus of opinion that the district court did not err in its choice of law upon which its jurisdiction depended, and its judgment is

AFFIRMED.

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MURNAGHAN, Circuit Judge dissenting:

Before the decision in *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970), the course which this case should have taken would have been simple enough. The plaintiff, customarily saddled with the burden of establishing a right to recovery, would have had to adduce evidence sufficient to establish all the elements of a cause of action under the Jones Act, 46 U.S.C. § 688.[1]

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1. Those ingredients include not only proof of the requisite wrongful conduct, but also proof of American contacts sufficient to establish the applicability of the Jones Act to the defendant, Hellenic Lines Ltd. While the appellee and the district judge have referred to the issue of Hellenic's American contacts as one going to the subject matter jurisdiction of the district court, it seems more proper to recognize the issue as relating to the existence *vel non* of a cause of action. As would be the case with any statutory cause of action, a failure to establish that the statute applies to the set of facts presented would lead to a judgment on the merits against the plaintiff, and not to a dismissal for lack of subject matter jurisdiction. *See, e.g., Romero v. International Terminal Operating Co.*, 358 U.S. 354, 357 n.4, 359, 381, 382 n.53, 385 (1959).

"As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action." *Id.* at 359. The Supreme Court's decision in *Bell v. Hood*, 327 U.S. 678 (1946), serves as the guide that will lead us out of the confusion. A well-pleaded complaint that arguably states a cause of action satisfies the subject matter jurisdiction requirement; upon further proof and consideration of the law, the cause of action might fail on its merits, but all the while subject matter jurisdiction remains undisturbed.

A parallel to the Sherman Act highlights the difference between subject matter jurisdiction and the cause of action itself. Read at face value, the Sherman Act condemns "[e]very contract . . . in restraint of trade," 15 U.S.C. § 1; the Jones Act makes liable any "defendant employer" in a suit brought by "[a]ny seaman", 46 U.S.C. § 688. But just as an understanding of the Sherman Act's

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The *Rhoditis* adjudication changed the scenario to a significant degree. In *Rhoditis,* it was established in a trial in federal district court, was affirmed by a court of appeals, and was impressed with the *imprimatur* of the Supreme Court, that Hellenic Lines Ltd. ("Hellenic"), the same party defendant in a Jones Act case as the defendant in the case *sub judice,* was an "employer" for purposes of the Jones Act. The voluminous evidence marshalled in the *Rhoditis* litigation showed that Hellenic had sufficient American contacts to bring its activities under the purview of the Act.

(Cont'd)

legal and policy heritage compels a conclusion that Congress did not really intend to proscribe "every" contract that restrains trade, *e.g., Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. Joint-Traffic Assn.*, 171 U.S. 505 (1898), an understanding of the backdrop of the Jones Act compels a similar conclusion that not every "defendant employer" truly was intended to be governed by the Act's proscriptions. The common law doctrine of "ancillary restraints," for instance, early was seen as a limitation on the plain and widereaching language of the Sherman Act, *e.g., United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899); the words of the Sherman Act, accordingly, had to be treated as terms of art. Similarly, longstanding principles of international comity and the traditions of admiralty practice inform and limit the plain, widereaching language of the Jones Act, rendering the words of that Act terms of art as well. *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 314-15 (1970) (Harlan, J., dissenting). An antitrust plaintiff who fails to establish that the contract he or she challenges is among those special contracts condemned by the Sherman Act plainly will suffer an unfavorable judgment on the merits. *E.g., Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 822 (1957). So, too, should a Jones Act plaintiff lose on the merits, rather than see the case dismissed for want of jurisdiction, whenever he or she fails to establish that the employer he or she sues is among those special "defendant employer[s]" subject to the Act.

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In my view the Rhoditis case should have been accorded presumptive collateral estoppel effect[2] by the district court, and the burden was Hellenic's to establish a change in circumstances since the *Rhoditis* litigation sufficient to relieve that adjudication of preclusive effect. By refusing to place that burden upon Hellenic and, instead, requiring the plaintiff, Dracos, to remake, if indeed not reinvent, the entire wheel, the majority has carried the concept of "changed circumstances" to an extreme that saps the collateral estoppel doctrine of its vitality. *Cf. Scooper Dooper Inc. v. Kraftco Corp.*, 494 F.2d 840, 846 (3d Cir. 1974) ("Rare would be the case in which counsel could not conjure up some factual element that had changed between adjudications.").

I

Time can work changes, a fact noted by the majority and an observation as to which no reasonable mind could register dissent. The question to be resolved here, however, is whether the mere possibility of change—a truism—should be allowed to render meaningless a factual finding reached a dozen years before after full, fair and vigorous litigation which, at least as likely as not, is dispositive of the case currently before us. To that properly phrased question, I submit, there is but one answer.

A

I have stated the question in terms of a mere possibility of change because, as a careful reading of the majority opinion

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2. We need not, for present purposes, investigate to what extent "presumptive collateral estoppel" differs from, or merely is contained within, the concept of a failure to meet the burden of proving the opposite.

will reveal, that is precisely what confronts us here. The linchpin of the majority's argument reads as follows:

> The dynamic nature of the shipping industry, with its constantly changing economic climate and regularly changing fleets, ports, and operations, indicates a changing factual situation that may require the choice of American law . . . one year but may not require the same choice some years later.

Ante, at 10. The majority's premise—that the shipping industry presents a constantly changing factual situation—is divined from nothing. No fact drawn from the record, no fact ascertainable by way of judicial notice, is summoned to set the shipping industry apart from the host of other industries implicated in litigation daily.

More importantly, the majority opinion, by abstracting the inquiry into one regarding an entire industry, fails to focus upon the relevant circumstances that are or are not so likely to change. It is not the entire shipping industry with which we primarily are concerned, but a specific business enterprise—Hellenic. Even less in the way of evidence suggests that Hellenic is a particularly volatile corporation subject to any change in circumstances that are pertinent here. Indeed, the evidence that we do have, along with the contentions of the parties here on appeal, is to the contrary. Of the circumstances established as pertinent by the Supreme Court in *Rhoditis*—i.e., the circumstances implicitly assumed to be rife for change in the majority opinion—particular consideration was paid to the fact that Hellenic's owner was a lawful permanent resident alien of the United States who had attained such status 18 years before that litigation. *Rhoditis*, 398 U.S. at 309. The owner's base of operations was New York, *id.*

at 310, and the ship upon which the injury occurred was among several Hellenic ships "earning income from cargo originating or terminating here," *id.* at 310. Confronted with those circumstances, the *Rhoditis* Court could "see no reason whatsoever to give the Jones Act a strained construction so that this alien owner, engaged in an extensive business operation in this country, may have an advantage over citizens engaged in the same business by allowing him to escape the obligations and responsibility of a Jones Act 'employer.' " *Id.* at 310.

As to those circumstances—the only circumstances that matter—what is there present in the record to support the proposition that change is anything more than a possibility? It is possible that, over the course of the twelve year period separating the *Rhoditis* decision and the present case, a change of ownership or a change in the owner's base of operations *might* have occurred. Certainly, though, it cannot be disputed that it is as likely that no change has occurred (or that any change has strengthened the plaintiff's case) as it is likely that change in fact has taken place which dictates a result different from that reached in *Rhoditis*.[3]

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3. Hellenic contends that the owner in fact has died. Brief for Appellee 25. The plaintiff contends that the death of the owner is irrelevant because his death did not occur until after her cause of action accrued. Reply Brief for Appellant 7. The record, however, is silent. Lacking evidence, we can only surmise that pertinent change is no more likely than irrelevant change. There is no evidence bearing on who the successor owner or owners were, or what were their citizenships and residences.

The record, it is fair to say, is in a state of great uncertainty surrounding the entire matter. That further demonstrates the speculative nature of change supposed to exist on the mere basis of the passage of twelve years. Who bears the burdens associated with the speculative nature of time and the changes it brings is, as shall be seen, the critical matter we should address in a principled fashion.

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It is a possibility that Hellenic's fleet might no longer service the United States to the extent that it did in 1970. But we do know, from Hellenic's own contentions, that its fleet still services the United States and that, in fact, Hellenic still operates regularly from a pier in New York. Knowing that much, it can only be concluded that change is no more likely than no change.

The case, then, involves but a truism: It is merely possible, but by no means more likely than not, that Hellenic's circumstances have changed.

B

The question properly stated, the answer easily follows. Where it is just as likely as not that circumstances have remained the same, where evidence of changed circumstances as a matter of fact is most readily available to the party against whom a prior judgment is asserted as collateral estoppel, and where there can be no question that the prior judgment was the product of a full, fair, and vigorous litigation, that prior judgment should be accorded presumptive collateral estoppel effect. The plaintiff was entitled to assert the *Rhoditis* decision and thus establish a *prima facie* case that Hellenic is a Jones Act "employer." The burden, then, properly shifted to Hellenic to come forth with facts pertinent to a real, and not hypothesized, change in circumstances sufficient to relieve the *Rhoditis* decision of preclusive effect. That Hellenic has not done.

Precisely such an approach is recommended by § 27 of the

Appendix B

Restatement (Second) of Judgments, which in pertinent part,[4] provides:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action . . . whether on the same or a different claim.

The Restatement's drafters foresaw the difficulties that might arise due to a change in circumstances, and addressed the issue in comment c of § 27. Consistent with those scholars who have given the matter careful thought, *e.g.,* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4417, at 159-69 (1981), the drafters of the Restatement advocated a flexible approach to the problem of time and the probable changes it will work. Under their view, a prior adjudication should be given no effect only when "the bearing of the first determination is *so marginal because of the separation in time and other factors negating any similarity.*" § 27, comment c (emphasis supplied). Where some time has passed, but not so much time that the first determination can rationally be deemed impertinent—our case—

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4. Omitted from the quotation of the Restatement's text is its qualification that the subsequent action be one "between the parties" to the first litigation asserted to be preclusive. The requirement of mutuality, of course, has fallen by the wayside, *e.g., Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979), as the drafters of the Restatement recommended, *Restatement (Second) of Judgments* § 29. Section 29 makes pellucidly clear that the existence *vel non* of a mutuality requirement has absolutely no bearing on the issue presented here, one involving only a question of possible change in factual circumstances as time has gone by.

the Restatement places the burden upon the party opposing the application of collateral estoppel to show that change has in fact occurred:

> [I]n the absence of a showing of changed circumstances, a determination that, for example, a person was disabled, or a nonresident of the state, in one year will be preclusive with respect to the next as well. In other instances the burden of showing changed or different circumstances should be placed on the party against whom the prior judgment is asserted.

§ 27, comment c.

The Restatement, of course, binds no one. But it is persuasive. Good sense should control and the policy advocated in § 27 makes eminently good sense. There is a public interest in reducing needless litigation in our crowded and heavily pressed courts of the same question time and again, absent some real reason to believe that time has, indeed, brought change. The case against repetitive litigation is stronger where, as here, the necessary evidence is not easily available to the party seeking to invoke the prior litigation but readily at hand to the party who would urge a change of circumstances. Hellenic knows best what Hellenic does; if indeed Hellenic's circumstances have changed since 1970, then it is Hellenic who is best situated to demonstrate that fact.

Integral to collateral estoppel policy, as well, is the public interest in affording a party its day in court; the jurisprudence of due process does not permit otherwise. Placing the burden on Hellenic to establish some change in its circumstances, however, is just such an offer of a day in court. Whatever hardship the

placing of such a burden upon Hellenic might produce is, I submit, negligible and, in any event, outweighed by the hardships that otherwise must be endured by the judicial system and parties such as the plaintiff here who should reasonably be able to rely as meaningful upon a valid and final judgment in an earlier case where the very same question was litigated.

II

The district court, I conclude, abused its discretion in refusing to give any weight to the *Rhoditis* judgment, a determination which, absent proof of a change in Hellenic's circumstances, would have established the applicability of the Jones Act and necessitated a denial of defendant's motion for judgment n.o.v. And because there is absolutely no evidence in the record pointing to a change in circumstances, the judgment n.o.v. obviously must be reversed.

Rather than reinstating the jury's verdict for the plaintiff, however, we should remand the case for a new trial only on the issue of the applicability of the Jones Act—i.e., on the issue of Hellenic's American contacts. That disposition is required because Hellenic, relying upon the trial judge's ruling that the *Rhoditis* decision was of no use to the plaintiff, consequently offered no proof of any changed circumstances it might have had available.

Hellenic is entitled to its day in court on that matter, and a new trial restricted to the "contacts" question serves that end. At that trial, the plaintiff would be entitled to assert the *Rhoditis* decision to establish *prima facie* that Hellenic is a Jones Act "employer" with the requisite American contacts. Absent production of sufficient evidence to the contrary by Hellenic, judgment would be entered for the plaintiff on the verdict returned by the jury. Should Hellenic sustain its burden on the "contacts"

question by showing a relevant change in circumstances, the *Rhoditis* decision would then have no bearing on the case here. In that event, unless plaintiff succeeds in proving anew American contacts sufficient to make Hellenic a Jones Act "employer" on the date the injury occurred, judgment for the defendant notwithstanding the verdict would be appropriate.

APPENDIX C—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1870

MARIA DRACOS, as Administratrix of the Estate of Nicholas Dracos, Deceased

Plaintiff-Appellant

v.

HELLENIC LINES LIMITED, a Corporation

Defendant-Appellant

O R D E R

Upon a request for a poll of the court on the petition for rehearing en banc, those voting in favor of rehearing en banc were Chief Judge Winter and Judges Phillips, Murnaghan, Sprouse and Ervin; those opposing rehearing en banc were Judges Russell, Widener, Hall and Chapman.

It is accordingly ADJUDGED and ORDERED that the poll has carried.

It is further ORDERED that the case will be reheard en banc in the regular order of business of the court. The clerk will make appropriate arrangements.

/s/ Illegible

For the Court

APPENDIX D—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT (EN BANC) AND DISSENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1870

Maria Dracos, as Administratrix of the Estate of Nicholas Dracos, deceased,

Appellant

versus

Hellenic Lines Limited, a corporation

Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge. (79-491-N)

On Petition for Rehearing En Banc.

Argued: December 5, 1983 Decided May 9, 1985

Following reargument en banc, and prior to our decision, Hellenic Lines filed a bankruptcy proceeding in the United States Bankruptcy Court for the Southern District of New York, Case No. 83-B11776. As a result of the bankruptcy proceeding, the

case before us became subject to the automatic stay provisions of the Bankruptcy Code, which was lifted by an order of that Bankruptcy Court October 1, 1984.

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN, and CHAPMAN, Circuit Judges.

Avram G. Adler (Anne E. Fialkowski, Adler, Barish, Levin and Creskoff; C. Arthur Rutter, Jr., John H. Klein, Breit, Rutter & Montagna, on brief) for Appellant; Carter B. S. Furr, W. L. Berkley, III (Jett, Agelasto, Berkley, Furr & Price on brief) for Appellee.

WIDENER, Circuit Judge:

This appeal presents to us the principal issue of what, if any, collateral estoppel effect facts previously found which underlie the choice of law in a maritime tort action should have in resolving a similar choice of law issue in a later action. Also involved is whether there are sufficient American contracts to require a choice of the law of the United States. The district court refused to give collateral estoppel effect to prior cases and concluded that the law of the United States did not apply. On the basis of this choice of law, the district court further concluded that it lacked subject-matter jurisdiction and granted the defendant's motion for judgment notwithstanding the verdict. We affirm

Appendix D

I.

Nicholas Dracos was the chief engineer aboard the M/V HELLENIC STAR. He was last seen alive on May 14, 1977, when the ship was berthed in Norfolk, Virginia. Later that day, members of the crew found Dracos dead in the ship's refrigerator hold.

Maria Dracos, the widow of Nicholas Dracos and the administratrix of his estate, filed suit on account of the death of her husband against Hellenic Lines, Ltd., which was his employer and the ship's owner. The complaint asserted causes of action for damages on account of negligence under the Jones Act, 46 U.S.C. §688, and for unseaworthiness under the general "American Maritime Law," apparently as a pendent claim. See *Romero*, infra, p. 380.

Throughout the course of this action, the defendant contested the district court's jurisdiction on the ground that the law of the United States did not apply. The defendant raised the issue of the applicability of foreign law in its answer and reiterated its position in its pretrial statement of issues and in various motions. Because it believed that Greek law determined the rights and liabilities of the parties, the defendant also asserted that the plaintiff's causes of action did not arise under the laws of the United States and thus the plaintiff had failed to state a jurisdictional basis for her suit. After the jury returned a plaintiff's verdict, the defendant moved for judgment n.o.v. Upon considering this motion, the district court concluded that neither federal law nor general maritime law of the United States applied

in this case. The district court thus found itself to be without jurisdiction and entered judgment for the defendant.[1]

II.

Federal courts are courts of limited jurisdiction; their jurisdiction will not be presumed. *Lehigh Mining & Manufacturing Co. v. Kelly*, 160 U.S. 327, 337 (1895). Accordingly, plaintiffs must affirmatively plead the jurisdiction of the federal court. FRCP 8(a)(1); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). Of course a federal court has jurisdiction to inquire into its own jurisdiction, *Romero v. International*

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1. We have not had urged upon us and do not decide any effect *The Bremen* and *Mercury Coal* cases, infra, should have upon our decision, but note that if the rules followed in those cases apply here the result would be the same. We also note that in *Lauritizen*, infra, at 589, the Court recognized that a contractual choice of law should generally control the parties' rights and duties, unless public policy requires otherwise. While *Rhoditis*, infra, did not in terms address the contractual choice of forum question, it could have been raised in that case. Whether there is any inconsistency between *Rhoditis* and *The Bremen*, the Supreme Court has not decided.

In *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972), decided after *Rhoditis*, infra, the Court upheld a forum selection clause in an international contract in an admiralty case, even though it would result in the application of foreign law in a foreign court. It held that forum-selection clauses are prima facie valid and should be enforced unless they are unreasonable under the circumstances. Id. at 10. *The Bremen* involved causes of action in contract and in tort, and the Court placed a heavy burden of proof on the party claiming that the particular controversy was not one in mind when the parties contracted. Id. at 17. *The Bremen* has been followed, in this circuit and elsewhere, in cases not involving international contracts or suits in admiralty. See *Mercury Coal & Coke, Inc. v. Mannesmann Pipe and Steel Corp.*, 696 F.2d 315, 317 (4th Cir. 1982).

Terminal Co., 358 U.S. 354, 359 (1959), and the district court did just that in the case at hand.

The plaintiff concedes, as she must, that she had the burden of showing such facts that would lead the court to choose American law. Therefore, the plaintiff's burden of proving jurisdiction was principally a burden to show that the court must choose American law, for on its choice of law its jurisdiction depended.

In *Lauritzen v. Larsen*, 345 U.S. 571, 583-90 (1953), the Supreme Court enumerated seven factors to be considered in choosing the proper choice of law to govern a maritime tort: (1) the place of the wrongful act, (2) the law of the flag, (3) the allegiance or domicile of the injured seaman, (4) the allegiance of the defendant shipowner, (5) the place of the execution of the employment contract, (6) the inaccessibility of the foreign forum, and (7) the law of the forum. The Court explained that like factors guide choices of law in light of the interests of the governments and national interest involved. Id. at 582. They also determine the applicability of both the Jones Act and general maritime law. *Romero*, supra, at 382. The Supreme Court has also said that these seven factors are not exhaustive and that they should not be applied mechanically. *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 308-09 (1970). The *Rhoditis* Court added other factors to be considered in choosing the proper law. The presence of the foreign shipowner's base of operations within the United States was an important factor in making the Jones Act apply to a foreign seaman's tort claim. 398 U.S. at 309. Additionally, it was held that the substantial and continuing American contacts of Hellenic Lines had to be considered. 398 U.S. at 310.

The district court in the case before us carefully considered

these factors. The defendant shipowner and employer was a Greek corporation. Its vessels flew the Greek flag and were registered under Greek law. Both the plaintiff and her husband were Greek citizens and domiciliaries. The contract of employment between Nicholas Dracos and the defendant was drafted and executed in Greece as a collective bargaining agreement of the Panhellenic Seaman's Federation. The contract made Greek law in Greek courts control the rights and liabilities arising from the employment relationship. Maria Dracos had remedies available in a Greek court had she chosen to seek them.

The district court found that only two of the *Lauritzen* factors pointed to the selection of American law. Nicholas Dracos died while the M/V HELLENIC STAR was berthed in Norfolk, and his widow sued in the United States District Court for the Eastern District of Virginia. As the district court correctly noted, these two factors are relatively unimportant in a maritime context. Because a ship may travel through waters governed by various nations, the test of lex loci delicti would introduce an untoward uncertainty in which standards apply. *Romero*, supra, at 384; *Lauritzen*, supra, at 583. The nature of maritime commerce is such that a vessel will inevitably have contacts with many different nations. If the courts of each nation with substantial contacts applied their own law, the overlapping duties imposed on shipowners would blight maritime shipping. *Lauritzen* at 581. And as is often the case with maritime torts, the place of the wrong in this case was fortuitous. *Romero* at 384.

The filing of suit in federal court is also immaterial unless this country has a significant interest in having its law applied. See *Lauritzen*, supra, at 590-91. An American interest can be most readily made out when the two most important *Lauritzen* factors, the ship's flag and the shipowner's allegiance, point to this country.

Lauritzen, supra, at 584-87. And in *Rhoditis* the Supreme Court decided that an analysis should take into account substantial and continuing American contacts. *Rhoditis* held that when the shipowner, although a foreign corporation, had its base of operations in the United States and had substantial and continuing contacts with this country, then American law applied in a maritime tort action. *Rhoditis,* supra, at 310.

In concluding that American law did not apply in this action against the same party defendant sued in *Rhoditis*, the district court examined the evidence of the defendant's operations and contacts with the United States. The court found the evidence insufficient to show an American base of operations or substantial enough American contacts to require an application of either the Jones Act or general American maritime law. These findings are factual and are not clearly erroneous. FRCP 52(a). It also concluded that earlier cases in which federal courts determined that American law applied in cases involving Hellenic Lines had no collateral estoppel effect.

III.

In the district court, the plaintiff relied on a number of cases, in which Hellenic Lines had been involved in the federal courts, to support its theory of offensive collateral estoppel. On appeal it does not rely on any of them except *Rhoditis*, which we will discuss later, and *Vassalos v. Hellenic Lines,* 482 F. Supp. 906 (E.D. Pa. 1979). *Vassalos* does not serve as an estoppel because there was no choice of law question decided in that case.

In *Rhoditis* the Supreme Court held that the defendant was subject to American law based on a finding that the shipowner had its base of operations in the United States and had substantial

and continuing American contacts. Those findings, however, concern the defendant's operations only at the time of the *Rhoditis* case. The *Rhoditis* Court did not purport to find that the defendant had its operations permanently based in this country or that its American contacts would continue indefinitely. Twelve years elapsed between the injury to Rhoditis and the death of Dracos.

The plaintiff in this action, who was neither a party nor in privity with a party to the *Rhoditis* litigation, asserts that she does not bear the burden of proving that the defendant had an American base of operations or substantial continuing American contacts because of the effect of the findings in *Rhoditis*. This is her principal claim on appeal.

The plaintiff's assertion is made possible by the discard of the doctrine of mutuality. That doctrine prevented a party from using a prior judgment to estop an adverse party from contesting an issue unless both parties were bound by the judgment. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 328 (1971). *Blonder-Tongue* approved in a patent case a defensive use of collateral estoppel, which in that case was a defendant's attempt to estop the relitigation of an issue that the plaintiff had already unsuccessfully litigated in a suit against another defendant. *Blonder-Tongue*, however, was a prelude to the offensive use of collateral estoppel by which a plaintiff may seek to estop a defendant from relitigating an issue previously litigated and lost to another and different plaintiff.

In *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979), the Supreme Court sanctioned the use of offensive collateral estoppel. *Parklane* approved a plaintiff's estoppel of a defendant from litigating an issue the defendant had previously lost in a suit against another and different plaintiff. In doing so, however, the Court

granted district courts "broad discretion to determine when it should be applied." *Parklane* at 331.

In the instant case, the plaintiff's attempt to preclude the defendant from relitigating the issue of the location of its base of operations or the substantiality of its American contacts is its claim to the use of offensive collateral estoppel.[2] The district court considered the propriety of allowing the defendant to be so estopped, and concluded that the doctrine should not apply. In refusing to apply the doctrine, the court reasoned at one place that earlier adjudication reflected the status of the defendant only as it existed several years prior to the accrual of the cause of action (twelve years between *Rhoditis* and the instant case, and ten years in the only other case on point). We think the district court's holding that the doctrine did not apply to the defendant is not an abuse of its broad discretion in view of the lapse of time.

We do not hold that the approach taken by the district court in this case is obligatory in each case, only that the approach it took was within its discretion. The approach a district court takes may well vary depending upon the facts of each case and such factors, for example, as lapse of time, as here. If the facts upon which choice of law and thus jurisdiction is based are fixed and subject to little or no change, then a district court may be within its discretion not to permit an effort to show change. On the other hand, if the facts upon which jurisdiction is based are inherently subject to change, then a district court may be justified

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2. We should say at this point that the issue presented to us was not presented to the district court in quite the same context. We have examined, for example, the briefs filed with respect to the motion for judgment n.o.v. and do not find any reliance on *Parklane*. And that case is not relied upon here although its application is the controlling authority.

in giving the prior finding no preclusive effect. Because the district court applied no presumption here, we have no occasion to consider whether or not any presumptive effect exists on account of the *Rhoditis* finding, and we lay down no general rule to be followed except that a district court may, within its discretion, examine the facts surrounding jurisdiction, determine whether they are fixed, or changing, or subject to change, and then ascertain what effect a prior finding has in each case. In the case at hand, the changing nature of the industry involved and the 12-year lapse of time indicate that the district court's action was consistent with the flexible approach we think should be taken although it did not denominate it as such. For a good discussion of the various aspects of this issue, see Wright, Miller and Cooper, *Federal Practice and Procedure* (1981), § 4417.

The dynamic nature of the shipping industry, with its constantly changing economic climate and regularly changing fleets, ports, and operations, indicates a changing factual situation that may require the choice of American law under *Lauritzen* and *Rhoditis* one year but may not require the same choice some years later. The district court pointed out in its opinion relevant facts with respect to base of operations and American contacts proved to have existed at the time of *Rhoditis* which the plaintiff did not prove continued to exist at the time of the injury or trial in this case. That is an additional reason for us to find that the district court did not abuse its discretion in declining to apply collateral estoppel to the facts necessary to make a choice of law upon which its jurisdiction depended. The case of *International Shoe Machine Corp. v. United Shoe Machinery Corp.*, 315 F.2d 449 (1st Cir. 1963), is persuasive here. In that case, offensive collateral estoppel was claimed under § 5 of the Clayton Act, 15 U.S.C. § 16, which established a kind of statutory offensive collateral estoppel well prior to the *Parklane* decision. The statute

permits a final judgment or decree in favor of the United States to be used as prima facie evidence by any other party as to all matters to which the defendant would be estopped in another action by the government. The court held that offensive collateral estoppel did not apply because the first judgment related only to the period embraced by the evidence adduced at the first trial. 315 F.2d at 457. Unless it is shown that the condition found at a first trial is so permanent as to be unlikely to be disturbed, then we think offensive collateral estoppel may not be used with respect to that condition unless it be shown that the facts upon which the condition was based continued to exist. Such facts were not shown here, as the opinion of the district court pointed out.

We are thus of opinion the district court did not err in its choice of law upon which its jurisdiction depended, and its judgment is

AFFIRMED.

Appendix D

MURNAGHAN, Circuit Judge, dissenting:

In dissent following a rehearing *en banc*, I have little to add to my dissent at the panel level appearing in *Dracos v. Hellenic Lines Ltd.*, 705 F.2d 1392, 1397 (4th Cir. 1983). I should point out two things, however:

A. The statement that Greek law should apply made in the contract between Hellenic and the seaman is put forth by the majority as a factor somehow distinguishing the Supreme Court decision in *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 318 (1970), the case which creates in my judgment an offensive collateral estoppel. For one thing, however, Hellenic delayed far too long in seeking to raise the point. Second, and more importantly, such a choice of law provision also appeared in the contract involved in *Rhoditis*,[3] yet was not given the effect the *en banc* majority attributes to it. Hence the provision calling for application of Greek law appearing in the Dracos contract hardly suffices as a basis for distinguishing *Rhoditis*.

B. There is solace in the reasoned assessment by United States District Judge Raymond J. Broderick in *Papaioannoiu v. Hellenic Lines, Ltd.*, 569 F.Supp. 724, 728-29 (E.D. Pa. 1983) of the issue which separates the majority and me:

> Upon serious reflection of the problems presented in this litigation, this Court finds that Judge

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3. Justice Harlan, dissenting, stated "In the case before us, there is no reason to disregard either the law of the flag or *plaintiff's contractual undertaking to accept Greek law as controlling . . . .*" (Emphasis supplied). Yet the majority of the Supreme Court did determine that there was a reason to disregard the contractual undertaking to accept Greek law as controlling.

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> Murnaghan's dissent enunciates the applicable rule which gives the *Rhoditis* decision a presumptive collateral estoppel effect regarding this Court's subject matter jurisdiction of Jones Act claims against Hellenic. . . . The passage of time, without more, is not sufficient to overcome the presumption created by *Rhoditis*. As heretofore noted, the defendant has not shown sufficiently changed circumstances regarding Hellenic. This Court therefore has determined that it has jurisdiction in this action based on the eight factors enunciated in *Lauritzen* and *Rhoditis* as well as on the basis of the defendant's failure to present sufficient evidence to overcome the effect of the collateral estoppel created by the findings of fact in *Rhoditis*.

I am authorized to state that Judge Phillips joins in this opinion.

WINTER, Chief Judge, dissenting:

I dissent for the reasons expressed in the dissenting panel opinion, Dracos v. Hellenic Lines Ltd., 705 F.2d 1392, 1397 (4 Cir. 1983), and for the reasons expressed by Judge Murnaghan in dissenting from the opinion of a majority of the in banc court.

APPENDIX E—EXCERPTS OF TRANSCRIPT OF HARRY PETSIS (PP. 13-15)

THE COURT: Oh, I don't think so.

I overrule the objection.

BY MR. BERKLEY:

Q. You may answer the question.

Did you receive any complaints about the machinery on the HELLENIC STAR prior to May 14, '77?

A. No, as far as I remember.

Q. If you had received any, would they be in your file?

A. We have no — we have nothing in our file saying that there was something major, abnormal, other than that, and we have all these certificates which shows that everything was in order.

MR. BERKLEY: Excuse me, Your Honor.

I have no further questions of this witness.

THE COURT: All right. You care to cross-examine?

MR. ADLER: May I, Your Honor? May I, Your Honor?

CROSS-EXAMINATION

BY MR. ADLER:

Appendix E

Q. How many ships are there in the fleet operated by Hellenic Lines?

A. Over on the East Coast of the United States, there are approximate twenty-two to twenty-four. It varies. Sometimes there are thirty. But I would say on the average of twenty-four ships — twenty-two to twenty-four ships.

Q. All right. And your office is where? Where is your office?

A. In New York.

Q. Where in New York?

A. 39 Broadway.

Q. And from 39 Broadway, you're responsible for the engineering —

You're the marine superintendent?

A. That is correct.

Q. All right. And as marine superintendent, are you only concerned with the engineering aspects of the vessel or are you also concerned with the other departments on a vessel?

A. We're concerned on hull and machinery maintenance.

Q. I see. Now, winches aboard a vessel are customarily repaired by the deck department; isn't that right?

Appendix E

A. No. If it's mechanical repairs, which is mechanical repairs, it's by the engineers.

Q. What parts of the vessel do you require the deck department —

Well, let me withdraw that question.

You have a deck maintenance man, don't you, —

A. We have —

Q. — among the deck — among the deck crew?

A. Well, we have the maintenance men of cleaning and all belongs to the deck — on the decks, but the machinery belongs to the engineer, the stuff.

Q. All right. So that on this fleet of ships, of which the HELLENIC STAR was one, all reports of survey, complaints, major repairs, would have to come to you at 39 Broadway?

A. On the East Coast, yes.

Q. And you have a pier in New York, too, don't you?

A. That's correct; yes.

Q. That's Hellenic Lines' pier.

It's Pier 57, isn't it?

A. It used to be, yes. It's still our own property, but we

moved to Northeast Terminal now, which is — Hellenic Lines contracting.

Q. When did you move?

A. I would say about a year, fourteen months ago.

Q. Okay. Now, when a vessel would come in to Pier 57 in New York, did you conduct — did you have your . . .

APPENDIX F—STIPULATION - FILED OCTOBER 2, 1984

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT
OF NEW YORK

CASE NO. 83 B11776

IN RE:

HELLENIC LINES LIMITED,

Debtor,

STIPULATION

WHEREAS, there is currently pending in the Court of Appeals for the Fourth Circuit the matter of *Maria Dracos, Adminstratrix of the Estate of Nicholas Dracos, Deceased, v. Hellenic Lines Limited;* and

WHEREAS, subsequent to the oral argument before the Court of Appeals and while the matter was still pending, Hellenic Lines Limited filed for protection under Chapter 11 of the Bankruptcy Act of the United States Bankruptcy Court for the Southern District of New York; and

WHEREAS, an Automatic Stay took effect on the filing of the said Petition in Bankruptcy; and

WHEREAS, the Court of Appeals having already heard re-argument and given the matter consideration was denied the opportunity to render its decision; and

WHEREAS, on August 10, 1984, Petitioner, Maria Dracos, Adminstratrix of the Estate of Nicholas Dracos, filed a Motion for Relief from the Automatic Stay arising from the filing of the Petition in Bankruptcy; and

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WHEREAS, the relief sought is solely for the purpose of allowing the Court of Appeals for the Fourth Circuit to render its decision in the matter still pending before it; and

WHEREAS, this Stay shall remain in effect for all other purposes.

IT IS HEREBY STIPULATED by counsel and the Attorney for the Trustee in Bankruptcy that the Automatic Stay is terminated solely for the purpose of allowing the Court of Appeals for the Fourth Circuit to render its decision in the matter of *Maria Dracos, Administratrix of the Estate of Nicholas Dracos, Deceased, v. Hellenic Lines Limited.*

IT IS FURTHER STIPULATED that this Stay shall remain in effect for all other purposes, and that no further actions shall be taken by the Petitioner without application to this Court.

Respectfully submitted,

ADLER & KOPS

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SO ORDERED:
BURTON R. LIFLAND
J.

Dated: October 1, 1984